4-12-1976

Martha S. Wells v. Fetzer Refrigerator Company

Reply Brief 1976-SC-0042

REPLY BRIEF

SUPREME COURT OF KENTUCKY

No. 76-42

MARTHA S. WELLS - - - - Appellant

versus

FETZER REFRIGERATOR COMPANY - Appellee

APPEAL FROM THE JEFFERSON CIRCUIT COURT
COMMON PLEAS BRANCH, SEVENTH DIVISION
HONORABLE THOMAS A. BALLANTINE, JR., JUDGE

REPLY BRIEF FOR APPELLANT

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This is to certify that a copy of this brief has been served on Mr. S. J. Stallings, Mr. G. William Blackburn, Jr., and Hon. Thomas A. Ballantine, Jr., Circuit Court Judge of Jefferson County, Kentucky pursuant to RAP 1.250.

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May it please the Court:

PURPOSE OF BRIEF

The appellant wishes to point out to the Supreme Court certain additional authorities and arguments in response to the issues raised in the appellee's brief.

QUESTIONS TO WHICH BRIEF IS ADDRESSED

1. Should the appeal be dismissed by the alleged failure of appellant to comply with RAP 1.210(a)(3)(b)?

2. Did the appellee mislead this court with respect to the statement of the president of Fetzer Refrigera-

tor Company with respect to the production of certain documents?

3. Did the trial court err in its instructions to the jury and by failing to give one or more of the instructions tendered by appellant (additional authorities and argument)?

ARGUMENT

1. The Appeal Should Not be Dismissed by the Alleged Failure of Appellant to Comply With RAP 1.210(a) (3) (b).

1. RAP 1.210(a)(3)(b) does contain with respect "to the statement of the case" that it include appropriate page references to the record and transcript of testimony. RAP 1.260(a) provides that failure to comply with any rule relating thereto the brief of the offending party may be stricken. It will readily be seen in this particular action, however, that appellee does not take issue with any of the statements contained in the statement of facts contained in the brief for appellant. They are thus conceding that the statement of facts by appellant is correct although they expand on that statement in their brief. It is submitted that under these circumstances no inconvenience or error has occurred, and that since the provisions of RAP 1.260(a) are discretionary with the Supreme Court that the attempt of the appellee to have the appeal dismissed on this ground be overruled.

This Court in *Sharp* v. *Sharp,* Ky., 491 S. W. 2d 639 declined to search the transcript of some thirteen

volumes of testimony where page references were not given. Distinguishing that case, however, is the fact that those matters were in serious controversy and even then the court did not dismiss the action.

2. The Appellee Misled This Court in Its Statement on Page 8 of Its Brief With Respect to the Production of Certain Documents.

The deposition of Clifford Fetzer, President of appellee was taken on May 21, 1975 pursuant to notice and the notice directed him to bring with him any and all papers, proofs of claims, or otherwise pertaining to insurance claims made by Fetzer Refrigerator Company as the result of the death of Norris A. Fetzer (TR 131). At his deposition Mr. Fetzer not only did not produce these papers, proofs of claims or other documents relating to this matter but led counsel for appellant to believe they would be produced through his attorney in a matter of several days. (Deposition of Clifford Fetzer pp. 41-42.) The statement in appellee's brief would lead one to believe that Clifford Fetzer was uncertain as to whether he had access to these papers. The fact is that whether he did or not it was incumbent upon him or his attorney to notify counsel for appellant that the requested documents were unavailable. The additional fact is that these documents may very well not have been "cumulative" evidence as appellee suggests on page nine of its brief, but if certain facts had been discovered prior to the trial could have had a material bearing on her case.

3. The Trial Court Erred in Its Instructions to the Jury and by Failing to Give One or More of the Instructions Tendered by Appellant.

The instructions given by the trial court on June 6, 1975 consisted of an interrogatory as follows: "Do you find from the preponderance of the evidence that Norris Fetzer intentionally took his own life?" The trial court refused to submit to the jury the appellant's theories that his death could have come about through accidental or non-intentional means, that Norris Fetzer had no intention or plan to take his own life when the deferred compensation agreement was entered into, that appellee, Fetzer Refrigerator Company was estopped to plead the defense of intentional self destruction by reason of having taken a contrary position in a court proceeding to recover under the provisions of an insurance policy on his life which was in the contestable period and to define state of mind, suicide, wilful, and non-intentional. The court's instructions and the instructions tendered by the appellant may be found on pages 2-4 of the second supplemental transcript of record.

The intention to kill oneself as an element of suicide was discussed in *Mutual Benefit Life Insurance Co.* v. *Davies,* 87 Ky. 541, 9 S. W. 812 (1888), in which decedent Davies took out a life insurance policy with plaintiff, and was found dead less than one month later. One condition of the policy was that there would be no payment (other than premiums paid to date plus interest) if the insured should "die by his own hand,"

unless he were insane. Because insanity negatived the required element of interest, the issue of falsifying answers on insanity questions was raised. The Kentucky Court of Appeals stated:

> (I)t is necessary for the defense not only to establish the insanity of the insured, if denied, but that he fired the fatal shot with the intention to take his life.

87 Ky. at 550, 9 S. W. at 812. The court cited *Manhattan Life Insurance Co.* v. *Broughton,* 109 U. S. 121 (1883), in which the husband took out a life insurance policy payable to his wife, but which was void in the event of suicide. The husband later hanged himself. The Supreme Court defined suicide as the deliberate purpose to end one's existence when in the possession and enjoyment of his mental faculties. 109 U. S. at 131.

Most case law dealing with the definition of "suicide" involves the issue of insanity. The question raised is usually whether a type of insanity negatives the required element of intent to kill oneself. That the issue of insanity is raised at all implies a fortiori that suicide must be *voluntary.* In *St. Louis Mutual Life Insurance Co.* v. *Graves,* 69 Ky. 268 (1869), decedent's life insurance policy provided that "if he shall die by his own hand this policy shall be void." The insured got drunk, borrowed a pistol, and shot himself. Although the issue of his sanity divided the court, it held unanimously that the self-killing has to be voluntary in order to void the policy. 69 Ky. at 272.

In the later case of *Pacific Mutual Life Insurance Co.* v. *Fagan,* 292 Ky. 533, 166 S. W. 2d 1007 (1943), a 17-year old boy accidentally stumbled and shot himself while playing "Russian Roulette" with a friend. The court's second instruction read:

> For the jury to find that the death of Edwin O'Hara Fagan (respondent's deceased) was effected through "accidental means" they must find that in the act which preceded the injuries something unforseen, or unexpected or unusual occurred which produced the injury.

292 Ky. at 537, 166 S. W. 2d at 1010. Again, there is a clear distinction drawn between "suicide" and "accident". The Kentucky court noted that such a definition of "accidental means" was universally applied. 166 S. W. 2d at 1009.

In a representative Missouri life insurance case, *Parker* v. *Aetna Life Insurance Co.,* 289 Mo. 42, 232 S. W. 708 (1921), the court stated:

> Though a clause relieving insurer from liability if the insured committed suicide while sane or insane is valid, yet the common-law definition of suicide was the act of designedly destroying one's own life by a person of years of discretion and of sound mind, and, in order to be suicide at all, the death must have been designedly, and not accidentally, inflicted upon himself by deceased.

232 S. W. at 714.

The common law presumption against suicide, which is discussed in *Kentucky Home Mutual Life Insurance Co.* v. *Watts,* 298 Ky. 471, 183 S. W. 2d 499 (1944), was

not mentioned in the court's instruction in the present case. This presumption is based on the natural personal value of human life, and makes a prima facie case against suicide. The forensic psychiatrist's testimony, that in his opinion the death was nonintentional (TE 397-424), when added to this presumption against suicide, should have put a great burden of persuasion on the opposing party, and should have been included in the court's instructions.

The rationale of this court in reversing the summary judgment entered in behalf of the appellant against appellee, Fetzer Refrigerator Company which may be found at Ky. 512 S. W. 2d 938 is based in large part on the Supreme Court case of *Ritter* v. *Mutual Life Insurance Company,* 169 U. S. 139, 18 S. Ct. 300, 42 L. Ed. 693 (1898). A careful reading of that case will show that the only issue cited by the court was the sanity of the insured at the time of his death. There was no question raised and it was undisputed that he took his own life. The art of medicine and in-depth studies by qualified physicians has greatly expanded the understanding of our society of the various factors which are to be considered in determining the cause of death in cases as the one before this court. The *Ritter* case, supra, was decided in 1898. Moreover, *Ritter* has been qualified substantially in at least two subsequent Supreme court cases, *Whitfield* v. *Aetna Life Insurance Company,* 205 U. S. 489, 51 L. Ed. 895, 27 S. Ct. 578 and *Northwestern Mutual Life Insurance Company* v. *Johnson,* 254 U. S. 96 (1920).

In *Northwestern Mutual Life Insurance Company* v. *Johnson,* (supra) at page 100-101 the Supreme Court of the United States qualified the *Ritter* holding and left no doubt that the case must be narrowly applied when it observed:

> "The public policy with regard to such contracts is a matter for the states to decide. Whitfield v. Aetna Life Insurance Company, 205 U. S. 489, 51 L. Ed. 895, 898, 27 Sup. Ct. Rep. 578. This case qualified the statement in Ritter v. Mutual Life Insurance Company, 169 U. S. 139, 154, 42 L. Ed. 693, 698, 18 Sup. Ct. Rep. 300, to the effect that insurance on a man's own life, *payable to his estate,* and expressly covering suicide committed by him when sane, would be against public policy. The point decided was *only* that when the contract was silent, there was an implied exception of such a death. There was evidence that the insurance was taken out with intent to commit suicide, and it plainly appeared that the act was done by the insured for the purpose of enabling his estate to pay his debts. The application, although excluded below, warranted against suicide within two years, within which time the death took place. So that all the circumstances gave moral support to the construction of the policy adopted by the Court in accordance with the view that has prevailed in some jurisdictions as to the general rule."

It will thus be seen that *Northwestern Mutual Life Insurance Company and Whitfield* observed that an important factor in the *Ritter* decision were the facts that the insurance was payable to his estate, that there was evidence that the insurance was taken out with intent

to commit suicide and that it was established through writings of the decedent that such an act was contemplated for the purpose of enabling his estate to pay his debts. It also apepared in *Ritter* that the application for insurance, although excluded in the lower court, warranted against suicide within two years.

It will thus be seen that the additional theories with respect to the death of Norris Fetzer as proposed in the instructions tendered by appellant should have been submitted by the trial court to the jury for its determination. As has been pointed out in the reply brief and in appellant's original brief on this appeal substantial evidence was introduced at the trial of this action to warrant and require submitting these theories to the jury for its consideration. The failure of the trial court to do so requires reversal of the action for a new trial.

CONCLUSION

It is earnestly submitted that the transcript of record, transcript of evidence, brief and reply brief filed by appellant in this action call to the attention of the Supreme Court of Kentucky several errors committed by the trial court and require that the judgment entered by the trial court dismissing the claim of the appellant should be reversed and remanded to the trial court for a new trial with directions.

Respectfully submitted,

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